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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**

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8 UNITED STATES OF AMERICA,

2:10-CR-410 JCM (GWF)

9 Plaintiff(s),

10 v.

11 ZELALEM BERHE,

12 Defendant(s).  
13

14 **ORDER**

15 Presently before the court is movant's Zelalem G. Berhe's motion for leave to proceed in  
16 forma pauperis (doc. # 92), petition for writ of habeas corpus (28 U.S.C. § 2255) (doc. # 91), and  
17 motion for documents in support of petitioner's case (doc. # 103). The court addresses each motion  
18 in turn.

19  
20 **I. Motion to Proceed In Forma Pauperis**

21 A court may authorize the commencement of any action without prepayment of fees or  
22 security, by a person who submits an affidavit that includes a statement of all assets and that the  
23 person is unable to pay such fees. 28 U.S.C. § 1915(a)(1). A prisoner seeking to bring a civil action  
24 without prepayment of fees or security, must submit a certified copy of the trust fund account  
25 statement for the prisoner for the 6-month period immediately preceding the filing. 28 U.S.C. §  
26 1915(a)(2). The application shall be made on the form provided by the court ("IFP Motion"). LSR  
27 1-1.  
28

On June 13, 2012, movant filed a motion for leave to proceed inform a pauperis (doc. # 92). Movant provided an affidavit including a statement of all of his assets and that he is unable to pay such fees. 28 U.S.C. § 1915(a)(1). Movant also included a certificate from the warden of his confinement facility regarding his inmate account for the 6 months leading up to the filing of his § 2255 motion. 28 U.S.C. § 1915(a)(2). Movant, however, failed to make the application on the form provided by the court as required by local rule LSR 1-1.

The court, having reviewed movant's motion, accompanying affidavit, and certified copy of his inmate account, finds total compliance with § 1915 and substantial compliance with the IFP Motion form. Movant certifies to the court that he receives only \$200 per month and at the time of filing he had \$174.74 in his inmate account. Finding good cause, the court GRANTS movant's motion to proceed in forma pauperis (doc. # 92).

## **II. 28 U.S.C. § 2255 Motion**

On June 13, 2012, movant filed a petition for writ of habeas corpus (28 U.S.C. § 2255). (Doc. # 91). The government filed a response (doc. # 102) and movant filed a reply (doc. # 107).<sup>1</sup>

### **A. Background**

On March 19, 2012, movant entered into a written plea agreement in which he pled guilty to one-count criminal information charging Aggravated Identity Theft and Aiding and Abetting under 18 U.S.C. §§ 1028A(a)(1), (c)(4), and 2. (Docs. # 83, 2:4-7). On May 23, 2012, District Court Judge Navarro sentenced movant to 24 months in prison, 1 year supervised release, and restitution in the amount of \$591,872.38. (Docs. # 89 and 97).

Subsequently, on July 2, 2012, petitioner timely filed the instant motion to vacate. (Doc. # 103). Movant raises two claims for relief. He alleges that his counsel rendered ineffective assistance by (1) failing, neglecting, or refusing to introduce § 6.45.01 of the North Las Vegas Police

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<sup>1</sup> Movant's motion to extend time is moot (doc. # 104), the court considers the movant's reply (doc. # 107).

1 Department policy manual and (2) making no attempt on cross-examination to impeach an officer  
 2 who testified as to the policy of the police department. (Doc. # 91, 4:9-18).

3  
 4 B. Discussion

5  
 6 *1. Procedural Default*

7 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court  
 8 imposed the sentence “in violation of the Constitution or laws of the United States . . . .” 28 U.S.C.  
 9 § 2255(a). Section 2255 relief should be granted only where “a fundamental defect” caused “a  
 10 complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also Hill v.*  
 11 *United States*, 368 U.S. 424, 428 (1962).

13 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair  
 14 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of  
 15 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed to  
 16 provide criminal defendants multiple opportunities to challenge their sentence.” *United States v.*  
 17 *Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

19 “When a defendant has raised a claim and has been given a full and fair opportunity to litigate  
 20 it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition.” *United*  
 21 *States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000). Further, “[i]f a criminal defendant could have  
 22 raised a claim of error on direct appeal but nonetheless failed to do so,” the defendant is in  
 23 procedural default. *Johnson*, 988 F.2d at 945; *see also Bousley v. United States*, 523 U.S. 614, 622  
 24 (1998).

1 This procedural default may be overcome by showing either (1) cause for failing to raise the  
2 issue and prejudice or (2) actual innocence. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir.  
3 2003). But the "cause and prejudice" exception revives only defaulted constitutional claims, not  
4 nonconstitutional sentencing errors. *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994).  
5 Further, ineffective assistance of counsel claims are an exception to procedural default, since the trial  
6 record is often inadequate for the purpose of bringing these claims on direct appeal. *Massaro v.*  
7 *United States*, 538 U.S. 500, 504–05 (2003) ("[F]ailure to raise an ineffective-assistance-of-counsel  
8 claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding  
9 under § 2255." *Id.* at 509).

12 Movant entered into a written plea agreement with the government. (Doc. # 83). In exchange  
13 for the benefits movant received under the plea agreement, movant agreed to waive "his right to  
14 bring any collateral challenge, including any claims under 28 U.S.C. § 2255 . . . ." (doc. # 83, 5:21-  
15 22), but movant retained the ability to attack "non-waivable claims of ineffective assistance of  
16 counsel" (doc. # 83, 5:23-24). Both claims movant asserts in his § 2255 motion are for ineffective  
17 assistance of counsel.  
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20 The government argues that movant's claims are procedurally defaulted because he "never  
21 raised his underlying challenges to the inventory search on direct appeal, having knowingly and  
22 voluntarily bargained away his right to do so in exchange for the concessions extended by the  
23 Government." (Doc. # 102, 7:14-16). However, the government's argument fails for two reasons.  
24 First, the government misconstrues movant's claims. Movant's collateral attack is based on an  
25 allegation of ineffective assistance of counsel, not his underlying challenges to the inventory search.  
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1 (Doc. # 91, 3:19-23). And movant *retained*<sup>2</sup> the right, following the plea agreement, to challenge  
 2 ineffective assistance of counsel. Thus, movant's claims would be procedurally defaulted because  
 3 he failed to bring the claims on direct appeal before filing this collateral attack on his sentence. *See*  
 4 *Johnson*, 988 F.2d at 945; *see also Bousley*, 523 U.S. at 622.

6 Second, movant's claims are not procedurally defaulted. The government fails to address an  
 7 exception to procedural default as stated in *Massaro*, 538 U.S. at 509, the same case the government  
 8 used to explain the rule of procedural default<sup>3</sup> The relevant exception stated in *Massaro* is that  
 9 “failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim  
 10 from being brought in a later, appropriate proceeding under § 2255.” *Id.* Therefore, although movant  
 11 failed to raise ineffective assistance of counsel on direct appeal, movant is *not* procedurally defaulted  
 12 from bringing this claim as a collateral attack to his sentence because ineffective assistance of  
 13 counsel claims, regardless of the underlying allegations for the ineffective assistance, are *an*  
 14 *exception* to the general rule of procedural default.

17 Thus, the court, finding that these claims have not been procedurally defaulted, turns to the  
 18 merits.  
 19

## 20 *2. Ineffective Assistance of Counsel*

21 To prevail on a claim of ineffective assistance of counsel, a defendant must show deficient  
 22 performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish  
 23 deficient performance, a challenger must show that “counsel's representation fell below an objective  
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25  
 26 <sup>2</sup> Movant did not “bargain away” his right to bring an ineffective assistance of counsel claim.

27 <sup>3</sup> Although the government states that the rule for procedural default applies when the “defendant fails to raise  
 28 a *substantive legal argument* on direct appeal” (doc. # 102, 7:19-20) (emphasis added) which, by its language does not  
 include ineffective assistance of counsel claims; the court finds this exception highly relevant to analysis of this issue.

1 standard of reasonableness.” *Id.* at 688. When considering this claim, a court must apply a “strong  
2 presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional  
3 assistance.” *Harrington v. Richter*, \_\_ U.S. \_\_, 131 S. Ct. 770, 787 (2010) (citations omitted).  
4

5 To show prejudice, a challenger must demonstrate “a reasonable probability that, but for  
6 counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*,  
7 466 U.S. at 694. The reasonable probability must rest on record evidence, not conjecture or  
8 speculation. *See Gonzalez v. Knowles*, 515 F.3d 1006, 1015-16 (9th Cir. 2008)  
9

10 Movant contends he was denied effective assistance of counsel because his trial counsel (1)  
11 failed, neglected, or refused to introduce § 6.45.01 of the North Las Vegas Police Department policy  
12 manual and (2) made no attempt on cross-examination to impeach an officer who testified as to the  
13 policy of the police department. (Doc. # 91, 4:9-18). The record before this court, however, strongly  
14 refutes movant’s allegations that counsel’s performance was deficient.  
15

16 First, movant’s counsel at the evidentiary hearing, Patrick McDonald, did not need to  
17 introduce the department’s inventory search policy. There was sufficient testimony before the court  
18 on the department’s policy such that McDonald’s failure to admit the written policy into evidence did  
19 not constitute deficient representation. On direct examination, Officer Blackwell testified that “[o]ur  
20 policy requires a full inventory of the vehicle.” (Doc. # 55, 16:14-16). And on cross-examination,  
21 McDonald asked Officer Blackwell “[w]hat is the policy on closed containers?” to which Officer  
22 Blackwell testified, “we can open closed containers to see if there’s anything of value in there.” (Doc.  
23 # 55, 30:10-12).  
24  
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26 The policy Officer Blackwell testified to provided the court with sufficient information to  
27 determine that Officer Sharp had not substantially complied with the requirements of the policy.  
28

1 Magistrate Judge Foley stated in his report and recommendation that "Officer Sharp acknowledged  
2 that [certain] items should not have been listed on the impound form . . . . This discrepancy, standing  
3 alone, does not invalidate the inventory search." (Doc. # 49, 16:4-7).

4  
5 Further, it was clear from the record that the department's policy comported with the general  
6 purpose of inventory searches. On direct examination, Officer Blackwell testified that "we want to  
7 make sure there's no weapons in [computer bags] . . . Mr. Berhe . . . [has] a criminal history, so we  
8 want to make sure, number one, that there's no weapons inside this bag." (Doc. # 55, 17:4-11). And  
9 Magistrate Judge Foley found that the policy "appears to be consistent with general public safety or  
10 community caretaking considerations relevant to such matters." (Doc. # 49, 16:3-4). There is no  
11 showing that failure to introduce the department's policy into evidence fell outside the "'wide range'  
12 of reasonable professional assistance," *Harrington*, 131 S. Ct. at 787, given the sufficient testimony  
13 Officer Blackwell provided on the issue at the hearing.

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15 Moreover, McDonald's failure to impeach Officer Blackwell also does not constitute  
16 deficient performance because Officer Blackwell's testimony is not in contravention with either the  
17 department's policy<sup>4</sup> or the case movant cited to in his motion.<sup>5</sup> (Doc. # 91, 4:19-22). The  
18 department's policy, in fact, bolsters Officer Blackwell's testimony about opening closed bags found  
19 in the car. (Doc. # 55, 17:4-11). And to the extent that Officer Sharp did not comply with the  
20 department's policy, Magistrate Judge Foley was aware of this and stated that, "[t]here is no basis  
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26 <sup>4</sup> Although the government states that the rule for procedural default applies when the "defendant fails to raise  
a *substantive legal argument* on direct appeal" (doc. # 102, 7:19-20) (emphasis added) which, by its language does not  
include ineffective assistance of counsel claims; the court finds this exception highly relevant to analysis of this issue.

27 <sup>5</sup> *Weintraub v. State*, 871 P.2d 339, 340 (Nev. 1994) held that an "inventory search must be carried out pursuant  
28 to standardized official department procedures and must be administered in good faith in order to pass constitutional  
muster."

1 on the record to find that the inventory search was simply a pretext to search the vehicle for evidence  
2 of criminal activity." (Doc. # 49, 15:22-23).

3  
4 Thus, an attempt to impeach Officer Blackwell's testimony based on the holding of  
5 *Weintraub* would have been fruitless. The case requires adherence to the department's policy, which  
6 the court was already aware of and excused. (Doc. # 49, 16:6-7). And the case requires that the  
7 inventory search be made in good faith, which the court found no pretextual motive. (Doc. # 49,  
8 15:22-23).

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10 Thus, this court finds that McDonald did not provide deficient representation for failure to  
11 introduce § 6.45.01 of the department's policy manual or for failure to impeach Officer Blackwell  
12 on cross-examination. Because movant has failed to show deficient performance, the court need not  
13 address prejudice.

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16 **III. Motion for Documents in Support of Petitioner's Case**

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18 Movant filed a motion for documents in support of his case. (Doc. # 103). The court  
19 construes this as a request for discovery, appointment of an attorney to assist with discovery, and a  
20 stay of the proceedings pending discovery, if granted.

21  
22 District courts, for good cause, may authorize parties to a § 2255 habeas proceeding to  
23 conduct discovery. RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES  
24 DISTRICT COURTS, RULE 6(a) (2012); *see also United States v. Finkel*, 165 Fed.Appx 531, 532 (9th  
25 Cir. 2006). Good cause under Rule 6(a) exists "where specific allegations before the court show  
26 reason to believe that the petitioner may, if facts are fully developed, be able to demonstrate that he  
27 is . . . entitled to relief . . ." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v.*  
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1 *Nelson*, 394 U.S. 286, 300 (1969)). Thus, requests for discovery pursuant to Rule 6 must be  
2 supported by specific reasons, and the party making the request “must also include any proposed  
3 interrogatories and requests for admission, and must specify any requested documents.” RULES  
4 GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS, RULE 6(a)  
5 (2012). Finally, “[i]f necessary for effective discovery,” the court must appoint an attorney for  
6 moving parties who qualify under 18 U.S.C. § 3006A. *Id.*

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8 The motion requests a copy of the transcript from the radio communication between Officer  
9 Blackwell, Officer Sharp, and dispatch on the February 7, 2010, traffic stop, and a “blank” copy of  
10 the appropriate vehicle personal property inventory form. This information is presumptively directed  
11 at uncovering evidence that his trial counsel should have introduced at the suppression hearing.  
12 Movant does not, however, provide the court with any of the “essential elements” of any of the  
13 claims he would hope to raise. *See Bracy*, 530 U.S. at 904 (citation omitted).

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15 Further, the claims that movant seeks to investigate are not meritorious. To vacate his  
16 conviction under ineffective assistance of counsel, movant would have to demonstrate that his  
17 counsel’s performance fell below an objective standard of reasonableness and a “reasonable  
18 probability” that the performance prejudiced his defense. *Strickland*, 466 U.S. at 687-94. As  
19 analyzed, McDonald’s representation did not fall below an objective standard of reasonableness, thus  
20 movant has shown neither that he is entitled to relief under § 2255 nor discovery related to these  
21 claims under Rule 6(a).

22 ...

23 ...

24 ...

1 **IV. Certificate of Appealability**

2 The court declines to issue a certificate of appealability. The controlling statute in  
3 determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as  
4 follows:  
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6 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge,  
7 the final order shall be subject to review, on appeal, by the court of appeals for the circuit in  
8 which the proceeding is held.  
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10 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of  
11 a warrant to remove to another district or place for commitment or trial a person charged  
12 with a criminal offense against the United States, or to test the validity of such person's  
13 detention pending removal proceedings.  
14

15 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not  
16 be taken to the court of appeals from--

17 (A) the final order in a habeas corpus proceeding in which the detention complained  
18 of arises out of process issued by a State court; or  
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20 (B) the final order in a proceeding under section 2255.

21 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made  
22 a substantial showing of the denial of a constitutional right.  
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24 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or  
25 issues satisfy the showing required by paragraph (2).  
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1 Under this section, if a court denies movant's § 2255 motion, the court may only issue a  
2 certificate of appealability when a movant makes a substantial showing of the denial of a  
3 constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the movant must  
4 establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition  
5 should have been resolved in a different manner or that the issues presented were 'adequate to  
6 deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation  
7 omitted).  
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9  
10 The court finds that movant has not made the required substantial showing of the denial of  
11 a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would  
12 not find the court's determination that movant is not entitled to relief under § 2255 debatable, wrong,  
13 or deserving of encouragement to proceed further.  
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15 Accordingly, the court declines to issue a certificate of appealability.  
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17 **V. Conclusion**  
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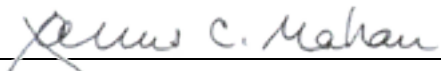
19 Accordingly,

20 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that movant Zelalem G.  
21 Berhe's motion for leave to proceed in forma pauperis (doc. # 92) be, and the same hereby is  
22 GRANTED.  
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24 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that movant's petition for writ  
25 of habeas corpus (28 U.S.C. § 2255) (doc. # 91) and motion for documents in support of petitioner's  
26 case (doc. # 103) be, and the same hereby are, DENIED.  
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1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that movant's motion to  
2 extend time (doc. # 104) is moot.

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4 DATED August 27, 2012.

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7 UNITED STATES DISTRICT JUDGE  
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